Supreme Court, U. S.
FILED
MAY 6 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

79-1773

No. _____

THOMAS C. ERICKSON and
ANETA J. ERICKSON,

Petitioners,

vs.

HONORABLE LUTHER B. EUBANKS,
UNITED STATES DISTRICT JUDGE FOR THE
WESTERN DISTRICT OF OKLAHOMA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CLYDE R. MAXWELL
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Newport Beach, CA 92660
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Attorney for Petitioners

J. GALLAGHER — Printed Briefs (714) 835-6522

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IN THE SUPREME COURT
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No. _____

THOMAS C. ERICKSON and
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HONORABLE LUTHER B. EUBANKS
UNITED STATES DISTRICT JUDGE FOR THE
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Respondent.

PETITIONER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

THOMAS C. ERICKSON and ANETA J. ERICKSON, the petitioners herein, pray that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Tenth Circuit, rendered and entered in the above-entitled case on April 25, 1980.

OPINION BELOW

The United States Court of Appeals for the Tenth Circuit ordered that Petitioners' petition for writ of mandamus be denied, on April 25, 1980, which is also the date of entry. There was no formal written opinion. The Order is attached hereto as Appendix K. The Petition for writ of mandamus is attached hereto as Appendix J.

JURISDICTION

The Order of the United States Court of Appeals for the Tenth Circuit denying Petitioners' petition for a writ of mandamus was rendered on April 25, 1980, and entered the same date. The Jurisdiction of the Supreme Court is based on 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the trial judge abuse his discretion or act inconsistently or unfairly by refusing to permit defendants to file their pretrial motion to suppress?

2. Did the action of the trial judge, in refusing to permit defendants the right to file their pretrial motion to suppress, deny defendants due process of law under the Fifth Amendment where there was no intentional waiver of the rights defendants sought to vindicate by their motion?

3. Did the action of the trial judge, in refusing to permit defendants the right to file their pretrial motion to suppress, deny defendants their rights to effective assistance of counsel under the Sixth Amendment?

4. Should the United States Court of Appeals for the Tenth Circuit have remedied defendants grievances by granting their Petition for Writ of Mandamus to Compel Filing of Pretrial Motions?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Federal Rules of Criminal Procedure, Rule 12:

(a) Pleadings and Motion: Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) Pretrial Motions. Any defense, objections, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

Requests for discovery under Rule 16; or

(5) Requests for a severance of charges or defendants under Rule 14.

(c) Motion Date. Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.

(d) Notice by Government of the Intention to Use Evidence.

(1) At the Discretion of the Government. At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule.

(2) At the Request of the Defendant. At the arraignment or as soon thereafter as is practicable the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidencewhich the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.

(e) Ruling on Motion. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if

a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(f) Effect of Failure to Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

(g) Records. A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.

(h) Effect of Determination. If the court grant a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody or that his bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any Act of Congress relating to periods of limitations.

Rules of the United States District Court for the Western District of Oklahoma, Rule 13(e):

(e) Motions in Criminal Cases. Motions in criminal cases and particularly motions made pursuant to

Rules 7 (f), 12, 16, 21 and 41 (e), Federal Rules of Criminal Procedures, shall be in writing and state with particularity the grounds therefor and the relief or order sought. All such motions shall be filed with the Clerk within ten (10) days after arraignment, and a copy served upon the United States Attorney, who shall respond within five (5) days after filing, unless a different time is fixed by a statute ot the Federal Rules of Criminal Procedure for such motions or responses thereto. All motions and responses thereto must be accompanied by a concise brief citing all authorities upon which the movant or respondent relies. The Court may, however, in its discretion, order or allow such motions or responses thereto to be filed at a time earlier than or later than that fixed by this Rule.

Federal Rules of Criminal Procedure, Rule 41(e) and (f):

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in

the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

(f) Motion to Suppress. A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

STATEMENT OF THE CASE

Defendants were arraigned on December 6, 1979, on charges of violating 26 U.S.C. Sec. 7203, 7206(2) and 7207, and were at that time assisted by other counsel. The District Court granted 10 days in which to file motions, pursuant to local rules, but then explained that he would be lenient in case extra time was needed. The only constraint facing him at that time was that the case had to be ready for trial on January 7, 1980, and the motions had to be heard and ruled on by that time. The Judge explained that he was not at liberty to extend the motion filing time a great deal because the Government had to be given some time to reply, but that if counsel found that they needed more time, they should let him know. See Appendix L. Four days later, on December 10, 1979, current defense counsel, a California attorney, was substituted in and retained by defendants while he was engaged full-time in conducting a criminal trial in Houston, Texas which was not concluded until December 20, 1979. Because of counsel's difficult schedule both during and immediately after the Houston trial, a continuance,

Appendix A, was granted during his only break from the Houston trial on December 18, 1979, continuing trial of the instant case from January 7 to February 11, 1980. See Appendix B. No corresponding continuance for filing of motions was granted, although one was requested, and the Court stated at that time that counsel for defendants only had until ten days after the arraignment to file pretrial motions. However, that time limit had already expired. On December 28, 1979, counsel filed with the Court a Motion for Leave to File Documents Out of Time, Appendix C, to which was attached a Motion to Suppress Evidence, Appendix D, and an affidavit providing a factual basis of good cause for late filing of the motion, in keeping with Rule 12(f), F. R. Cr. P. The Motion for Leave to File Documents Out of Time was denied by the Court on January 2, 1980, Appendix E, and the Motion to Suppress was considered as though never filed. Thereupon, a Notice of Appeal was filed by defendants on January 11, 1980, Appendix F. The District Court granted a Stay Pending Appeal, Appendix G.

The United States Court of Appeals for the Tenth Circuit, on April 1, 1980 after considering a Memorandum Brief, Appendix H, disposed of the appeal by dismissing it for the reason that the Order appealed from was considered to be non-appeallable since it was not, in the Court's opinion, Appendix I, a final order to which 28 U.S.C. Sec. 1291 would apply, nor was it covered by the "collateral orders" doctrine of **Abney v. United States,** 431 U.S. 651, 52 L.Ed.2d 651 (1977).

Subsequently, on or about April 15, 1980, a Petition for Rehearing and Suggestion for Rehearing In Banc was filed. A Petition for a Writ of Mandamus for Compel Filing of Pretrial Motions, Appendix J, was also filed, on or about April 11, 1980. Both Petitions were denied on April 25, 1980, and the Judgments were entered that day, Appendix K. Denial of the Petition for Rehearing and the underlying dismissal of the Appeal is the subject of a separate Certiorari Petition. This Petition only deals with the Tenth Circuit's refusal to grant the Petition for Writ of Mandamus.

It should be noted that, in addition to the motion to suppress, another pretrial motion was filed on January 2, 1980. That motion was to permit inspection of grand jury minutes and attendance records, and the same procedures were followed with respect to that motion as were followed with respect to the motion to suppress — both in the District Court and the Court of Appeals. However, this Petition for Certiorari will only be concerned with the motion to suppress.

REASONS FOR GRANTING WRIT

1. **The United States Court of Appeals for the Tenth Circuit has decided a federal question in a way that is in conflict with applicable decisions of the Supreme Court.**

In **Jones v. United States,** 362 U.S. 257, 264, 4 L.Ed.2d 697 (1960) Justice Frankfurter, speaking for an

eight member majority, stated that:

> "... This provision of Rule 41(e), requiring the motion to suppress to be made before trial, is a crystalization of decisions of this Court requiring this procedure, and is designed to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt. [citations omitted] As codified, the rule is not a rigid one, for under Rule 41(e), 'the court inits discretion may entertain the motion [to suppress] at the trial or hearing.' **This qualification proves that we are dealing with carrying out an important social policy and not a narrow, finicky procedural requirement." (emphasis added)**

In **Jones,** the Court was dealing with the old form of Rule 41(e), F.R.Cr.P., the function of which is now included in Rule 12, F.R.Cr.P. However, the rationale of the Court has not been lost. We are still dealing with an important social policy, one that is in fact tied closely with notions of due process and fair trials.

In this case, the facts indicate a diligent attempt by counsel to file motions **well in advance** of trial. In fact, the trial itself was **continued** for the very reason given by counsel for his inability to meet the Court's motion deadlines, under Rule 12(f), F.R.Cr.P. Given the trial continuance, there remained a great deal of time in which motions could have been prepared, heard and considered all at once. There would have been no burdensome administrative problems thrust on the trial judge in these circumstances.

Therefore, under the **Jones** case, for the trial court to use Rule 12, F.R.Cr.P. as an instrument to bar defendants' rights to file pretrial motions, would be a violation of due process of law, and not in keeping with the **Jones** Court's views of the policies sought to be enforced by the Rules. The Court of Appeals, in denying the Petition for Mandamus has necessarily refused to follow **Jones,** even though that case disposes of the issue of defendants to have their motions filed.

2. **The Court of Appeals has so far sanctioned a departure from the accepted and usual course of judicial proceedings by the District Court, as to call for an exercise of the Supreme Court's power of supervision.**

For a motion to suppress to be timely, it must be made **prior to trial.** This is the principal requirement of Rule 12(b), F.R.Cr.P. Rule 12(c), by permitting motion dates, only provides for the orderly application of 12(b).

Here, the District has refused to allow defendants the right to have their motion filed and considered, even though it was filed well in advance of trial. To the extent that it was late, it was with well-documented reasonable cause, as provided by Rule 12(f). The District Court has therefore allowed its own admistration of Rule 12(c) to subvert the clear intention of Rule 12(b) and (f), and to the extent that it has done so, the District Court has committed an abuse of discretion. This is especially clear in light of the **Jones** case discussed in the previous section of this Argument. The Court of Appeal for the Tenth Circuit,

in denying the Petition for Mandamus to correct the District Court's abuse, has apparently sanctioned this behavior which is sought to be reviewed on Certiorari.

The following issues presented for review are discussed in this context:

a. In addition to the arguments already made regarding the trial court's abuse of discretion, it must be noted that the court was originally willing to grant additional time in which to file motions, and that the court's only constraints were in preparing the matter for trial before another judge by a certain date. The judge's inconsistency and change of mind in these circumstances certainly shows even more forcefully that an abuse of discretion has occurred.

b. The defendants have never waived, nor did they intend to waive, any of the rights they seek to vindicate by their motion to suppress. Where such a motion is timely filed, it is presumed that a defendant would be entitled to whatever relief he can validly claim as a **matter of right.** In this case, despite the fact that defendants do not intend to waive their rights, they have been cut of by the District Court from whatever relief they might have had **as of right.** This is claimed to violate their rights to due process of law under the Fifth Amendment, because they have lost the procedural right to make their claim and to have it considered. This cannot be the intent of Rule 12, considered in light of the **Jones** case, **supra.**

Certainly the "punishment" (foreclosing defendants' right) does not fit the "crime" (tendering motions for filing as soon as was possible, well in advance of trial, with a

showing of good cause for late filing—in keeping with Rules 12(b) and (f).

c. The actions of the trial court also denied defendants the effective assistance of counsel, guaranteed by the Sixth Amendment. The defendants chose current defense counsel because of his well-known expertise in the criminal tax field, even though he was an out-of-state attorney. The defendants should not be penalized because they enlisted defense counsel's aid during a brief period when he was unable to direct enough attention to their case. Counsel, in order to be effective, must be given the opportunity to present the defendants' suppression motion. As has been shown, this was attempted at the earliest possible instance in accordance with Rule 12(f). Again, it was an abuse of discretion for the District Court to refuse defendants their right to effective assistance of counsel in this preceeding.

d. The Court of Appeals for the Tenth Circuit should have granted the Writ of Mandamus to Compel Filing of Pretrial Motions.

Defendants showed, in their mandamus petition, that (1) they had a clear right to the relief sought; (2) there was a clear and preemptory duty on the part of the District Court to do the act in question; and (3) no other adequate remedy was available. These issues are considered below:

(1) Petitioners had a clear right to the relief sought because the Court of Appeals may issue the Writ in aid of its own jurisdiction. Here, granting of the Writ, which would issue to a lower Court within the Tenth Circuit's

appellate jurisdiction, would preserve the issues sought to be raised by the suppression motion for appellate consideration in the event the motion to suppress is denied.

(2) The Respondent Judge had a clear and peremptory duty to do the act in question for those reasons discussed above, where it was asserted that the District Court's failure to allow filing of the motion was an abuse of discretion. That contention is based primarily on the **Jones** case, **supra.**

The legislative record of Rule 12 and related Rule 41(e) also support this view. The Notes of the Advisory Committee on Rules, discussing the rationale of Rule 12(c), which provides for the setting of motion dates, states:

> ". . . This and other amendments to rule 12 are designed to make possible and to encourage the making of motions prior to trial, whenever possible, and in a single hearing rather than in a series of hearings. This is the recommendation of the American Bar Association's Committee on Standards Relating to Discovery and Procedure Before Trail (Approved Draft, 1970) . . ."

Similarly, the Notes of the Advisory Committee on Rules re-affirms this basic purpose in the note to Rule 41(e):

> 'A sentence is added to subdivision (e) to provide that a motion for return of property, made in the district of trial, shall be treated also as a motion to suppress under rule 12. This change is intended to **further the objective of rule 12 which is to have**

all pretrial motions disposed of in a single court appearance rather than to have a series of pretrial motions made on different dates, causing undue delay in administration." (emphasis added)

Certainly these notes are to be given some weight in ascertaining the purpose of Rule 12. And if they are given due consideration, it will be found that the facts here do not show a violation of the rules. Counsel did not attempt to raise the suppression issue at trial. but **well in advance.** And he did not seek a series of hearings, but would have been pleased to raise the issues at a single hearing, had one been granted. Therefore, these Notes of the Advisory Committee further indicate the District Court's clear and peremptory duty to consider the motions as properly filed.

(3) No other adequate remedy was available. If the defendants' motion is not raised **before** trial. then it may only be considered thereafter in the **discretion** of the reviewing court, or in the discretion of the trial court **during** trial. The defendants intend to make the motions that they are entitled to make **as of right**, and to this end they have submitted their motions well in advance of trial, with an adequate showing of good cause under Rule 12(f).

The Court of Appeals, in dismissing the defendants' appeal from the District Court's Order denying the motion to file out of time left no other remedy open to the defendants but to petition for a Writ of Mandamus, as they have done.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Clyde R. Maxwell
Attorney for Petitioners

APPENDIX "A"

Clyde R. Maxwell
Attorney at Law
567 San Nicolas Dr., Suite 401
Newport Beach, CA 92660
(714) 644-5232

FILED
DEC 17 1979
HERBERT T. HOPE
CLERK, U.S. DISTRICT COURT
BY _____
DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

UNITED SATES OF AMERICA,

vs.

THOMAS C. ERICKSON and
ANETA J. ERICKSON

Cr. No. 79-184-E
MOTION FOR CONTINUANCE

MOTION FOR CONTINUANCE

Come now defendants Thomas C. Erickson and Aneta J. Erickson through their attorney Clyde R. Maxwell, and move the Court for a continuance of the proceedings in the above entitled matter. The following statements are made in support thereof:

1. Motions in the above matter are now set for December 24, 1979.

2. Trial of the above matter is now set for January 7, 1980.

3. The defendants did not retain counsel until just a few days ago; the counsel who was retained was, and still is, in a criminal tax trial in Houston, and unable to prepare for this case until the trial is concluded. It is estimated that there will not be enough time between the time trial is concluded and the time proceedings are to begin in this matter for adequate preparation to be made.

4. This matter presents matters of considerable complexity which needs adequate preparation; there are 45 counts in the indictment, representing 3 different kinds of charges; there will be possibly 30 to 40 witnesses that must be interviewed. Neither the original files or copies thereof, upon which some of the charges are apparently based, are in possession of the defendants or counsel, and when these files are obtained, considerable time must be spent in going through them.

5. It is now projected that motions to suppress evidence and to dismiss the indictment will be made, and counsel must have adequate preparation time. For this purpose, discovery motions must also be made.

6. Defendants will waive their rights under the Speedy Trial Act. Counsel will have the waiver filed as soon as possible. Defendants are now on bail, and not in custody.

7. Counsel for defendants, Clyde R. Maxwell, is scheduled to begin a criminal tax trial in Fresno, California, on January 8, 1980, estimated to take approximately one and one-half weeks. Counsel also has a civil trial in which

he is a plaintiff, scheduled to begin on January 24, 1980.

WHEREFORE, Defendants pray that their Motion for Continuance be granted.

DATED: 12-17-79

CLYDE R. MAXWELL,
Attorney for Defendants

AFFIDAVIT OF CLYDE R. MAXWELL

Clyde R. Maxwell, being duly sworn, deposes and says:

1. That he is the attorney for Thomas C. Erickson and Aneta J. Erickson, defendants in a criminal tax matter, in the United States District Court for the Western District of Oklahoma, Criminal No. 79-184-E.

2. That he has read the Motion for Continuance to which this Affidavit is attached, and he knows that the information contained therein is true and correct.

Further affiant sayeth not.

CLYDE R. MAXWELL

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

Oklahoma City, Oklahoma
Dated: December 18, 1979

UNITED STATES OF AMERICA

Plaintiff,

vs.

THOMAS C. ERICKSON, et al.

Defendant.

Case No. CR-79-184-E

To Herbert T. Hope, Clerk:

Please enter the following minute order in the above entitled case.

The Motion for Continuance filed herein by the defendants on December 17, 1979, is granted and this case is stricken from jury trial assignment of January 7, 1980, and reset for jury trial on Monday, February 11, 1980, at 9:30 a.m. this continuance does not carry with it any extension of time for the filing of motions and none will be considered except those that are filed within ten days from the date of arraignment, and then only when supported

with a brief as is required by local rule 13(d). Furthermore, this order of continuance is granted in reliance upon all matters stated in the application therefor, specifically including, but not limited to, the waiver by the defendants of their rights under the Speedy Trial Act as promised in numbered paragraph 6 of said motion.

Furthermore, the court understands that the United States Attorney for the Western District of Oklahoma consents to this continuance, and same is entered without objection of the Government.

Counsel Notified _____
Clerk to Notify xx (s)_____,
United States District Judge

APPENDIX "C"

CLYDE R. MAXWELL, ESQUIRE
567 San Nicolas Drive, #401
Newport Beach Calif. 92660
Telephone: (714) 644-5232

Attorney for Defendants

IN THE UNITED STATE DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA
Plaintiff

Cr. No. 79-184-E

vs.

THOMAS C. ERICKSON and ANETA J. ERICKSON,
Defendants.

MOTION FOR LEAVE TO FILE DOCUMENTS OUT OF TiME

Defendants THOMAS ERICKSON and ANETA ERICKSON, by and through their attorney, CLYDE R. MAXWELL, hereby request the Court to accept their Motion to Suppress Evidence in the above-entitled matter for filing at this time, based on the attached affidavit of CLYDE R. MAXWELL.

WHEREFORE, defendants pray that the Court will deem said Motion properly filed.

DATED this 28th day of December, 1979.

(s) Clyde R. Maxwell

Attorney for Defendants

AFFIDAVIT OF CLYDE R. MAXWELL

STATE OF CALIFORNIA)
ss.
COUNTY OF ORANGE)

CLYDE R. MAXWELL, being first duly sworn, deposes and says:

1. That he is the attorney for defendants Thomas and Aneta Erickson in criminal case no. CR-79-184-E.

2. That Thomas and Aneta Erickson did not retain him as their attorney until December 9, 1979, at which time he was conducting a criminal trial in Houston, Texas, which did not conclude until December 20, 1979. He did not have local co-counsel and had to give his undivided attention to the conduct of said trial.

3. That upon the conclusion of trial in Houston, several post-trial matters needed to be taken care of, which further burdened his time schedule.

4. That based upon his difficult schedule, the Court has granted a continuance of the trial until February 11, 1980. To this end, the defendants have waived their rights under the Speedy Trial Act.

5. That the court did not grant a corresponding continuance for filing of pre-trial motions.

6. That only during the week beginning December 24, 1979, has counsel been able to review the documentary materials and communications with his client in this case, and to evaluate those events which now appear to require the filing of certain pre-trial motions on the defendants'

behalf. During this time, however, counsel has been short of office help, because of the Christmas Holidays, which coincided with this time period.

7. That he has diligently pursued the matters at hand and is prepared now to file certain pre-trial motions.

8. That he does not ask the Court's leave to file said motions for the purpose of delay.

9. That the interests of justice in the instant case would require the Court to consider the matter raised in said motions at this time, and they therefore should be permitted to be filed with the Court.

Further affiant sayeth not.

(s) Clyde R. Maxwell

Subscribed and sworn to before me this 28th day of December, 1979.

(s) Sylvia J. Busch

Notray Public in and for said
County and State

(SEAL)

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA,)
ss.
COUNTY OF ORANGE)

I am employed in the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: 567 San Nicolas Drive, Suite 401, Newport Beach, California 92660; I am employed in the office of a member of the bar of this court at whose direction the following service was made:

On December 28, 1979, I served the within entitled Motion for Leave to File Documents Out of Time on the United States of America in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Newport Beach, California addressed as follows:

LARRY D. PATTON
United States Attorney
WILLIAM S. PRICE
Assistant U.S. Attorney
4434 Federal Building
Oklahoma City, Oklahoma 73102

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on December 28, 1979, at Newport Beach, California.

(s) Sylvia J. Busch

APPENDIX "D"

CLYDE R. MAXWELL, ESQUIRE
567 San Nicolas Drive, #401
Newport Beach, Calif. 92660
Telephone: (714) 644-5232

Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)
	) Cr. No. 79-184-E
Plaintiff,	)
	) MOTION TO
vs.	) SUPPRESS
	) EVIDENCE AND
THOMAS C. ERICKSON and	) MEMORANDUM
ANETA J. ERICKSON,	) OF POINTS AND
	) AUTHORITIES
Defendants.	) IN SUPPORT
	)

COMES NOW defendants THOMAS C. ERICKSON and ANETA J. ERICKSON, by and through their attorney, CLYDE R. MAXWELL, and state to the Court as follows:

1. Property belonging to THOMAS and ANETA ERICKSON was seized from the premises of the Erickson Tax Preparation office located at 211 S.E. 2nd Street in the city

of Anadarko, Oklahoma, pursuant to a search warrant issued September 14, 1979 by Federal Magistrate RONALD L. HOWLAND.

2. Said property consisted of lists of clients and fees of Erickson Tax Service, and files containing information relating to the preparation of client returns, including copies of tax returns.

3. The search warrant is defective in that it is too broad and fails to state with particularity what items are to be seized.

4. The search warrant was supported by an affidavit which does not show probable cause to believe that the subject records and documents were on the premises, because the information relied upon in said afidavit was too remote in time.

5. The search warrant was a subterfuge, applied for in bad faith, to obtain records that were protected by THOMAS and ANETA ERICKSON'S right under the Fifth Amendment.

6. THOMAS and ANETA ERICKSON have been the subjects of an unreasonable search and seizure of property, which has in turn led to the improper obtaining of other evidence, including but not limited to, testimony of THOMAS and ANETA ERICKSON, and testimony of clients of the Erickson Tax Service.

WHEREFORE, THOMAS and ANETA ERICKSON pray that the Court order the suppression of all evidence obtained pursuant to said invalid search warrant and the fruits thereof.

DATED this 28th day of December, 1979.

(s) Clyde R. Maxwell

Attorney for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE

1.The search warrant was defective because it is too broad.

The Fourth Amendment requires that no warrant shall issue but upon probable cause, supported by oath or affirmation, and "particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend 4. The search warrant herein, after describing some items to be seized, permits the seizure of "other documents, all of which are evidence or instrumentalities of a criminal offense, in violation of Title 26 United States Code, Sections 7206(2) and 7203." This description is too broad, and permitted the officers executing the search to go on a fishing expedition through defendants' property. This fact is pointed out more fully by the fact that the agents who carried out the search seized six filing cabinets

in bulk, without first inspecting them to make certain that all of the records contained therein conformed to the requirements of the warrant with respect to property that could be seized.

2. The search warrant was not supported by an affidavit showing probable cause, because the information relied upon therein was too remote.

The information sources upon which the affidavit was based were as follows: Opal Gibson, who observed the defendants' place of business from December, 1976 to February, 1977; Joyce Green, who observed from February, 1978 to August, 1978; and Betty Guy, who observed from January, 1978 to August, 1978. These three witnesses gave statements with respect to the preparation of false returns, and the latter two gave statements with respect to records of fee income of Thomas and Aneta Erickson, and with respect to the places in which records were kept. The last of the witnesses is said to have heard Mr. Erickson say that he had not paid income taxes for the previous three or four years. There was no indication that Mr. Erickson owed any income taxes for the years in question or that he knew he owed any taxes, and such a statement cannot create probable cause to suspect that a criminal violation had occurred, or that evidence thereof was on the premises in question. The most recent observation by any of the three was in August of 1978, more than one year previous to the issuance of the search warrant.

Inaddition to the three witnesses already listed, there is a statement by Danita Palesano, who observed the office

of the Ericksons from January, 1978, until the date of the affidavit in support of the warrant. She did not make any statement with respect to the preparation of false returns. The only issue addressed by her were the locations in the office of certain client records, and where lists of fees were kept.

Last, there was a statement by Jo Ann Metcalfe, of the Internal Revenue Service Center, to the effect that no tax returns for Thomas or Aneta Erickson are on file for the years 1976, 1977, or 1978.

None of this information, by itself or in combination, can support a probable cause basis for the issuance of the search warrant.

a. **All information with respect to the preparation of false returns was too remote.**

The only statements in the affidavits concerning the alleged violations of 26 U.S.C. §7206(2) were made by observers who had last observed the Erickson's business in either February, 1977 or August, 1978. The information of one witness was about 19 months old, and the information of the other two was about 13 months old. This information was "stale," and could not support a finding of probable cause to believe that the subject records and documents were on the premises or that a crime was being committed at the time of the warrant. **United States** v. **Van Ert,** 350 F. Supp. 1939 (D. Wis. 1972); **United States** v. **Sawyer,** 213 F. Supp. 38 (D. Penn.1963).

b. **The testimony of Danita Palesano, which current, did not cure any defects with respect to**

the stale information.

The testimony of Danita Palesano only provided information regarding the location of current records in the Erickson's office. In no way does this information allege any violation of a criminal statute, or even suggest such a violation. The only information provided concerns the location of records, which is an irrelevant and innocuous matter when probable cause to support a search warrant is in issue. Furthermore, Danita Palesano stated that the records of clients fees had been last observed in May, 1979. This information was therefore about 4 months old at the time the warrant was issued, and was stale, remote, and irrelevant.

c. **The statement of Jo Ann Metcalfe, which was current, did not cure any defects with respect to the stale information.**

The testimony of Ms. Metcalfe only tended to establish that the Ericksons had not filed tax returns for 3 years. This did not tend to show that a crime had been committed or that evidence of a crime or the fruits or instrumentalities would be found on the premises of the Erickson's business. First, nothing has been shown to support a showing that either Thomas or Aneta Erickson was a person required to file a tax return, for whatever reason. Second, nothing was shown to support a conclusion that fruits or instrumentalities of a crime would be found at the specific location alleged in the search warrant, as Ms. Metcalfe was not shown to have any knowledge with respect to this matter.

3. **The search warrant violated Thomas and Aneta Erickson's right under the Fifth Amendment.**

The search warrant was subterfuge, intended to obtain in an improper manner information which was otherwise protected by the defendants' Fifth Amendment right. The defendants were individuals, not incorporated, who had a protected interest in the materials seized.

4. **The invalid search warrant resulted in testimony of the defendants and of other witnesses, which would not have been obtained but for the search warrant.**

As a result of the invalid search warrant, and improperly obtained evidence resulting therefrom, statements by the defendants and of various clients of the defendants were also obtained. These statements suffer from the same basic infirmity as the invalid search warrant itself, and should be suppressed for the same reason.

WHEREFORE, defendants pray that the relief requested in their Motion to Suppress be granted.

DATED this 28th day of December, 1979.

Respectfully submitted,

(s) Clyde R. Maxwell

Attorney for Defendants

(PROOF OF SERVICE BY MAIL)

STATE OF CALIFORNIA)

ss.

COUNTY OF ORANGE)

I am employed in the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 567 San Nicolas Drive, Suite 401, Newport Beach, California 92660; I am employed in the office of a member of this court at whose direction the following service was made:

On December 28, 1979, I served the within entitled MOTION TO SUPPRESS EVIDENCE AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT on the United States of America in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Newport Beach, California addressed as follows:

LARRY D. PATTON
United States Attorney
WILLIAM S. PRICE
Assistant U.S. Attorney
4434 Federal Building
Oklahoma City, Oklahoma 73102

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on December 28, 1979, at Newport Beach, California.

(s) Sylvia J. Busch

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Oklahoma City, Oklahoma
Dated: January 2, 1980

RECEIVED
JAN 4 '80
C.R. MAXWELL

UNITED STATES OF AMERICA
Plaintiff,

Case No. CR-79-184-E

UNITED STATES OF AMERICA
Plaintiff,

vs.

THOMAS C. ERICKSON and
ANETA J. ERICKSON
Defendant.

To Herbert T. Hope, Clerk:

Please enter the following minute order in the above entitled case.

The Motion for Leave to File Documents Out of Time Which was filed herein on this date is denied and the tendered motions annexed to the same are considered not filed. The court, when it granted defendants a continuance of their trial, made it clear that no extension of time was

granted wihin which to file motions. Local Rule 13(e) clearly allows ten (10) days after arraignment within which to file motions. This was called to the attention of defendants and their counsel when they were arraigned on December 6, 1979. No motion to extend time for filing motions was made within said initial ten-day period.

Counsel Notified _____
Clerk to Notify XX (s)_____
United States District Judge

APPENDIX "F"

CLYDE R. MAXWELL, ESQUIRE
567 San Nicolas Drive, #401
Newport Beach, Calif. 92660
Telephone: (714) 644-5232

FILED
JAN 11 1980
HERBERT T. HOPE
CLERK, U.S. DISTRICT COURT
BY
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Cr. No. 79-184-
Cr. No. 79-184-D

Plaintiff,

vs.

NOTICE OF APPEAL

THOMAS C. ERICKSON and
ANETA J. ERICKSON,

Defendants.

Notice is hereby given that THOMAS C. and ANETA J. ERICKSON, defendants above named, hereby appeal to the United States Court of Appeals for the Tenth Circuit, from the Order of the United States District Court for the Western District of Oklahoma, denying defendants the right to have their tendered motions annexed to same considered filed, entered in this action on the 2nd day of January, 1980.

DATED this 9th day of January, 1980

CLYDE R. MAXWELL
Attorney for Defendants

(PROOF OF SERVICE BY MAIL)

STATE OF CALIFORNIA,)
ss
COUNTY OF ORANGE)

I am employed in the county aforesaid; I am over the age of eighteen years and not a party ot the within entitled action; my business address is: 567 San Nicolas Drive, Suite 401, Newport Beach, California 92660; I am employed in the office of a member of the bar of this court at whose direction the following service was made:

On January 9, 1980, I served the within entitled: NOTICE OF APPEAL on the United States of America in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Newport Beach, California addressed as follows:

LARRY D. PATTON
United States Attorney
WILLIAM S. PRICE
Assistant U.S. Attorney
4434 Federal Building
Oklahoma City, Oklahoma 73102

I declare, under penalty of perjury, that the foregoing is true and correct.
Executed on January 9, 1980, at Newport Beach California.

SYLVIA J. BUSCH

APPENDIX "G"

Oklahoma City, Oklahoma
Dated: January 15, 1980

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA
Plaintiff,

vs. **Case No. CR-79-184-E**

THOMAS C. ERICKSON, ET AL
Defendant.

To Herbert T. Hope, Clerk:

Please enter the following minute order in the above entitled case.

By minute order of January 14, 1980, defendants' Motion for Reconsideration of Motions for Leave to File Documents Out of Time was overruled. Presented in the alternative was defendants' Motion for Stay of Proceedings pending the Tenth Circuit's action on defendants' appeal of this court's denial of their Motion for Leave to File Documents Out of Time. Notice of Appeal was duly filed on January 11, 1980. Accordingly,

IT IS ORDERED that trial or other proceedings in the above-entitled cause be stayed until disposition by the Tenth-Circuit of defendants' appeal of this court's order.

Counsel Notified _____
Clerk to Notify XX

(s)_____,
United States District Judge

APPENDIX "H"

CLYDE R. MAXWELL, ESQUIRE
MORGAN C. TAYLOR, ESQUIRE
567 San Nicolas Drive, #401
Newport Beach, Calif. 92660
Telephone: (714) 644-5232

Attorneys for Appellants

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee, **Nos. 80-1076 and 80-1077**

vs.

THOMAS C. ERICKSON and ANETA J. ERICKSON,
Defendants-Appellants.

MEMORANDUM BRIEF

Come now, Thomas and Aneta Erickson, appellants herein, by and through their attorneys, Clyde R. Maxwell and Morgan C. Taylor, and the state as follows:

The issue that has been presented is whether the appeal under consideration is within the jurisdiction of the Court of Appeals for the Tenth Circuit. If the Order of the District Court denying Appellant's Motion to File Documents Out of Time and refusing to consider the attached Motion to Suppress Evidence is a final and appealable Order within the meaning of **28 U.S.C.** §1291 and

Federal rules of Appellate Procedure, Rule 4 (b), then the Court of Appeals would have jurisdiction, and the appeal should not be summarily dismissed. Further, if the Court of Appeals determines that an appeal does not lie, and that the criteria for issuance of a writ of mandamus are met, then the Court may treat the appeal as an application fro the writ, which may then issue. These matters will be considered separately.

1. **Appealability of the Order.**

Rule 4 of the Federal Rule of Appellate Procedure merely provides that appeals from District Court orders in criminal cases must be filed within 10 days of the entry of the order. The Rule does not add or detract from the definition of and "appealable order" under **U.S.C.** §1291, and cases decided thereunder. All of the requirements of Rule 4 have been met in this case, and the only question remaining is whether the order appealed from is "final" under §1291 and the applicable case law.

The appeal is taken from a final order of the District Court, denying defendants-appellants' Motion for Leave to File Documents Out of Time, and was made pursuant to §1291.

Title **28 U.S.C.** §1291 permits appeal from "final decisions." The instant order is **not** one denying suppression of evidence, although the motion which the appellants would seek leave to **file** is a suppression motion. This distinction is most important, since the appellants admit that denial of a suppression motion itself would **not** be appealable as a final order. **Carroll v. United States,**

354 U.S. 394, 1 L. Ed. 2d 1442 (1957). Here, the issues involved are completely different. The practical effect of the District Court's order is to deny hearing and consideration of important issues bearing on the prosecution; it is not a ruling on the merits of appellants' contentions with respect to those issues. It is therefore a "collateral order," and as such, is immediately appealable under §1291.

The appealability of collateral orders has been well settled at least since **Cohen v. Beneficial Loan Corp.,** 377 U.S. 541, 92 L. Ed. 1528 (1949), when it was recognized that there were certain decisions which "... fall into the small class which finally determine claims of right separarble from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction." **Cohen, supra,** at 546.

The order in question in **Cohen** involved the right to a security bond for litigation expenses in a shareholder's derivative suit, and the Court found that it was "... a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." **Cohen, supra,** at 546-7. See also **Eisen v. Carlisle & Jacquelin,** 417 U.S. 156, 170-172, 40 L. Ed. 2d 732 (1974).

The rule of **Cohen** has been extended to cover several pretrial proceedings in criminal cases. For example, in

Stack v. Boyle, 342 U.S. 1, 96 L. Ed. 3 (1951), the Court held that where bail is excessive, the proper remedy is by motion to reduce bail, with right of appeal to the Court of Appeals, under §1291. Other situations in which an appeal by way of §1291 is permitted include: denial of motion to proceed in **forma pauperis, Roberts v. United States,** 339 U.S. 844, 94 L. Ed. 1326 (1950); criminal contempt orders, **Bray v. United States,** 423 U.S. 73, 46 L. Ed. 2d 215 (1975); and denial of motion to dismiss indictment on double jeopardy grounds, **Abney v. United States,** 431 U.S. 651, 52 L. Ed. 2d 651 (1977). See also **Swift & Co. v. Compania Caribe,** 339 U.S. 684, 94 L. Ed. 1206 (1950); making an order vacating an attachment in admiralty appealable, in which the court noted that §1291 ". . . should not be construed so as to deny effective review of a claim fairly severable from the context of a larger litigious process." **Swift, supra,** at 689.

The most important concern here, then, is to properly characterize the order of the District Court which is being appealed from, to determine whether it is a "collateral order." As stated earlier, the order itself is not a denial of a pretrial motion. It is, rather, a denial of a right to file a pretrial motion and to have it considered. Therefore, the **only issue** involved in this appeal is appellants' right to consideration of the motion by the District Court. The Appeals Court will not pass on the merits of the motion itself, but if appellant are successful, the Court will remand to the District Court with directions to permit the motion to be filed and considered. For purposes of this

argument, therefore, the nature of the order which is being appealed from is a "denial of a right to be heard." The effect of this denial, in this case, is that it is a denial of due process, being an abuse of discretion, and it is also a denial to the appellants of the effective assistance of counsel.

In **Abney v. United States,** supra, in which it was held that a District Court's pretrial order denying dismissal of the indictment on double jeopardy grounds was a final order within the meaning of §1291, the Court had occasion to provide considerable clarification of the "collateral orders" doctrine.

First, the Court noted that the pretrial denial of a motion to dismiss on double jeopardy grounds is not "final" in the sense that it terminates the criminal proceedings in District Court. **Cohen, supra,** did not require this, and neither does **Abney,** where the matter is a collateral one, and it was not left "open, unfinished, or inconclusive."

Second, the orders in **Cohen** and **Abney** were not simply "step[s] toward final disposition of the case which would be merged in final judgment," rather, they "resolved an issue completely collateral to the cause of action asserted."

Third, the decisions involved important rights which would be lost, "probably irreparably," if review had to wait until final judgment.

Applying the **Abney** criteria to the matter at hand, we find, first, that indeed the dispute concerning the appellants' right to file their pretrial motions will not "terminate" the proceedings; yet, it also evident that the issue is not

left "open, unfinished or inconclusive." This is so because the District Court has ruled **definitively** on the issue of appellants' right to file their motions.

Second, the issue of the denial of appellants' right to consideration of this claim is not simply a step toward final disposition of the case; it is an issue completely collateral to the main action. In **Abney** the Court reasoned in a way that is particularly relevant to the matter at hand:

> "Moreover, the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, **"the defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence which the government plans to use in obtaining a conviction." Abney, supra,** at 659. (emphasis added)

Here, as in **Abney,** the issue is not related to the merits of the charges in any way; neither is the order appealed from a denial of a suppression motion. **All that is involved is the right to hearing and consideration, which is a fundamental guarantee of the Constitution, and which has nothing whatsoever to do with the merits of the main action.**

Third, there is no doubt that the right involved would be lost. In fact, that is the **purpose** of rules which, in effect

penalize parties for ostensible failure to follow them. If appellants are not permitted to file their motions for consideration, they cannot have a fair trial or make a proper record. The standard of review is clearly different with respect to the merits of their motions if the motions are never permitted to be filed in the first place. Here, appellants have asserted that any failure to follow the rules to the letter was either excusable or unavoidable — evidenced by unopposed affidavits of counsel attached to the original motions.

An important ground upon which appellants ask for relief is that they have been denied effective assistance of counsel. The Court of Appeals for the Second Circuit has taken the view, in **Farber v. Riker-Maxson Corp.,** 442 F. 2d 457 (2nd Cir. 1971), that an order refusing to entertain nonlead counsel's motions and prohibiting such counsel from taking further action in violation of the court's order appointing lead counsel, was immediately appealable under §1291. That case was strictily a **civil** action. Here, we have a **criminal** case — to which the Sixth Amendment guarantee of Assistance of Counsel applies. The holding of the Second Circuit Court of Appeals would seem to have an even more compelling ring to it in **this** context than in the context in which it was decided.

Additionally, the Supreme Court has indicated that **Abney, supra,** should be broadly construed. In **Helstoski v. Meanor,** 61 L. Ed. 2d 30 (1979), Chief Justice Burger, speaking for seven members of the Court, held that where a

motion to dismiss an indictment on Speech or Debate Clause grounds had been denied, there was nothing further that could be accomplished on that ground in the trial court, and the order would be immediately appealable under §1291. The remarkable point made in **Helstoski,** however, is that the Court regarded the application of **Abney** (which involved a double jeopardy claim) to the Speech or Debate situation to be "predictable," and it therefore thought it proper to penalize **Helstoski** for his failure to read **Abney** broadly and to have proceeded by mandamus rather than appeal. The clear message of **Helstoski** is that the "collateral orders" doctrine is not to be rigidly applied to certain specific and pre-defined factual situations, but rather, whenever the **rationale** of the rule is found to apply.

The only other recent Supreme Court case of which counsel is aware, **United States v. MacDonald,** 435 U.S. 850, 56 L. Ed. 2d 18 (1978), does not detract from this view. While the Court did hold that denial of a speedy trial claim was not appealable before trial, it re-affirmed **Cohen** and **Abney,** and stated that the resolution of such a claim "necessitates a careful assessment of the particular facts of the case. As is reflected in the decisions of this Court, most speedy trial claims, therefore, are best considered only after the relevant facts have been developed at trial." **MacDonald, supra,** at 858. Here, there is nothing to be developed at trial which would shed any light whatsoever on the appellants' rights to have their pretrial motions filed and considered. This issue is just **too collateral** to the

main issues, and the time is now ripe for review.

Therefore, the appellants' emphasize what appears to them to be a clear right to review of the orders appealed from at this point in time, and the Court of Appeals is respectfully requested to grant them the right to proceed by appeal, and to refrain from summary dismissal.

2. **TREATMENT OF APPEAL IS APPLICATION FOR WRIT OF MANDAMUS.**

This issue has arisen only because the Court of Appeals has indicated that it may find itself without jurisdiction over the appeal. The appellants have consistently and in good faith regarded the jurisdiction of this Court to have been properly invoked under the "collateral orders" doctrine. However, if the Court should dismiss the appeal, the rights sought to be vindicated here are still too important to be lost. The Courts of Appeal have consistently held that where appeal is found to be improper, and where the requirements for mandamus otherwise exist, the Court may treat the appeal as an application for the writ. The writ may then issue, or the Court may grant leave to file a formal petition therefor. **Leesona Corp. v. Cotwool Mfg. Corp.,** 308 F. 2d 895 (4th Cir. 1962); **Steccone v. Morse-Starrett Products Co., 191 F. 2d 197 (9th Cir. 1951); Shapiro v. Bonanza Hotel Co.,** 185 F. 2d 777 (9th Cir. 1950); **Woodcock v. Donnelly,** 470 F. 2d 93 (1st Cir. 1972); **Western Geophysical Co. of America v. Bolt Associates, Inc.,** 440 F. 2d 765 (2nd Cir. 1971).

All parts of the record upon which a petition for mandamus would be made are already part of the record on

appeal. The statement which follows is intended to supply the information that is required by Rule 21 of the Federal Rules of Appellate Procedure. If this statement is inadequate, the appellants' request that leave to file a formal petition be granted.

The request is pursuant to the All Writs Act, and it is asked that a writ of mandamus issue, directing the District Court, Judge Luther B. Eubanks, to grant the Motion for Leave to File Documents Out of Time, and to permit appellants to file their Motion to Suppress Evidence, and have it considered on the record.

The reasons why said writ should issue are as follows:

a. **Appellants (petitioners) have a clear right to relief sought.** The Court of Appeals may issue the writ in aid of its own jurisdiction. Here, where the writ will be issued to a lower Court within the jurisdiction of the Tenth Circuit, and will preserve the issues sought to be raised by the suppression motion for appellate consideration, the right of the appellants to this form of relief is clear.

b. **There is clear and peremptory duty on the part of the District Court to do the act in question.** Rule 12 (b) of the Federal Rules of Criminal Procedure provides that:

> "Any defense, objection, or request which is capable of determination without trial of the general issue may be raised before trial by motion. . . . The following must be raised prior to trial: (1) Defenses and objections based on defects in the institution of the prosecution; or (2) Defenses and objections

> based on defects on the indictment or information . . .; or (3) Motions to suppress evidence; or Requests for discovery under Rule 16 . . ."
>
> Subsection (c) provides that:
>
> "Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing."

Rule 41, subsections (e) and (f) provide respectively, that a motion for return of property made after and indictment shall be treated as a motion to suppress under Rule 12, and that motions to suppress may be made in the court of the district of trial, as provided in Rule 12.

Taken together, these rules essentially provide for the orderly disposition of certain kinds of claims that are typically, if not routinely, raised in criminal prosecutions. According to rules that have evolved in Congress and the Courts, a party with a valid claim of one kind or another would presumably be entitled to appropriate relief, which could be obtained by making a timely motion. In other words, relief is to be had as a matter of right, providing it is timely requested.

For a request or motion to be timely, it must be raised **prior to trial.** That is the principal requirement of Rule 12(b), and the Courts have agreed that in the usual case, the rule is a fair one. See e.g., **Jones v. United States,** 362 U.S. 257, 264, 4 L. Ed. 2d 697 (1960). Rule 12(c) only provides for the orderly application of 12(b). The Notes of

the Advisory Committee on Rules provide us with the rationale of 12(c) regarding motion dates:

> ". . . This and other amendments to rule 12 are designed to make possible and to encourage the making of motions prior to trial, whenever possible, and in a single hearing rather than in a series of hearings. This is the recommendation of the American Bar Association's Committee on Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) . . ."

Similarly, the Notes of the Advisory Committee on Rules re-affirm this basic purpose in the note to Rule 41(e):

> "A Sentence is added to subdivision (e) to provide that a motion for return of property, made in the district of trial, shall be treated also as a motion to suppress under Rule 12. This change is intended to further **the objective of rule 12 which is to have all pretrial motions disposed of in a single court appearance rather than to have a series of pretrial motions made on different dates, causing undue delay in administration."** (emphasis added)

In **Jones v. United States, supra,** at 264, Justice Frankfurter, speaking for an eight member majority, noted that:

> ". . . [t]his provision of Rule 4(e), requiring the motion to suppress to be made before trial, is a crystalization of decisions of this Court requiring this procedure, and is designed to eliminate from

> the trial disputes over police conduct not immediately relevant to the question of guilt. (citations omitted). As codified, the rule is not rigid one, for under Rule 41(e) the Court in its discretion may entertain the motion [to suppress] at the trial or hearing.' **This qualification proves that we are dealing with carrying out an important social policy and not a narrow, finicky procedural requirement."** (emphasis added).

In **Jones,** the Court was dealing with the old form of Rule 41(e) — the function of which is now included in Rule 12. However, the rationale of the Court is not lost — we are still dealing with an important social policy, one that is in fact tied closely with notions of due process and a fair trial.

In this case, the facts indicate an attempt by counsel to file motions **well in advance** of trial. In fact the trial itself was **continued** for the very reasons given by counsel for his inability to meet the Court's motion deadlines. Why the motion date was not also continued upon timely request is a mystery. Given the trial continuance, there remained a great deal of time in which motions could have been prepared, heard, and considered all at once. There would have been no burdensome administrative problems thrust on the trial judge in these circumstances. As set forth in the affidavits of appellants' counsel, the motions that were tendered for filing were prepared as quickly as possible under the circumstances, well in keeping with the policy of Rule 12 to make such motions **before** trial. the cause of delay, as set out in the affidavits, was counsel's

involvement in another trial, and other attendant problems.

The appellants do **not** waive the rights intended to be vindicated by their motions. They did **not** wait until trial to raise the issues contained therein, or cause any undue surprise or disruption of the trial. Certainly, the "punishment" (foreclosing appellants' rights) does not fit the "crime" (tendering motions for filing as soon as was possible, well in advance of trial — in keeping with Rule 12(b)).

Appellants' rights to have their motions filed and considered on the record are clear. The failure of the trial judge in this instance amounts to an abuse of discretion and denial of effective assistance of counsel, which can be remedied by a writ of mandamus compelling him to consider the motions as filed. No request is made to the Court of Appeals to direct the District Court to grant the tendered motions, only to consider them on the record and to see that appellants receive a fair trial. The District Court **has a duty** to oversee the federal judicial process and to ensure a fair trial in every instance.

c. **No other adequate remedy is available.**

If the appellants' motions are not raised **before** trial, then they may only be considered thereafter in the **discretion** of the reviewing court, or in the discretion of the trial court **during** trial. The appellants intend to make the motions that they are entitled to make **as of right,** and to this end they have submitted their motions well before trial. If the writ is not granted, and the case proceeds to

trial, the appellants rights have been all but lost. The scope of review by the Court of Appeals will be minimal. In addition, if the District Court grants appellants' motions, there would be no need for trial at all.

WHEREFORE, appellants respectfully request that their appeal be permitted to proceed; and that in the event the appeal is dismissed, that a writ of mandamus issue to compel the needed relief, or that appellants be given leave to apply for such a writ.

DATED this 25th day of February, 1980.

Respectfully submitted,

CLYDE R. MAXWELL
MORGAN C. TAYLOR

Attorneys for Appellants

By Clyde R. Maxwell

(PROOF OF SERVICE BY MAIL)

STATE OF CALIFORNIA,)

ss

COUNTY OF ORANGE)

I am employed in the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: 567 San Nicolas Drive, Suite 401, Newport Beach, California 92660; I am employed in the office of a member of the bar of this court at whose direction the following service was made:

On February 26, 1980, I served the within entitled MEMORANDUM BRIEF on the Appellee in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Newport Beach California, addressed as follows:

LARRY D. PATTON
United States Attorney
WILLIAM S. PRICE
Assistant ULSL Attorney
4434 Federal Building
200 N.S. Fourth
Oklahoma City, OK 73102

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on February 26, 1980, at Newport Beach California.

SYLVIA J. BUSCH

APPENDIX "I"

4-1-80 80-1076 - 80-1077 - 80-1085 - 80-1086

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SLIP OPINION

NOT FOR ROUTINE PUBLICATION

FILED
United States Court of Appeals
Tenth Circuit
APR 1 1980
HOWARD K. PHILLIPS
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

V. No. 80-1076

THOMAS C. ERICKSON,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Apellee,

V. No. 80-1077

ANETA J. ERICKSON,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 80-1085

THOMAS C. ERICKSON,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 80-1086

ANETA J. ERICKSON,
Defendant-Appellant.

Appeals from the United States District Court
For the Western District of Oklahoma
(Civ. No. 79-00184-E)

Submitted on the briefs pursuant to Tenth Circuit Rule 9:
Clyde R. Maxwell and Morgan C. Taylor, Newport Beach, California, for Defendants-Appellants.
Larry D. Patton, United States Attorney, William S. Price, Assistant United States Attorney, Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Before
PICKETT, McWILLIAMS and SEYMOUR, Circuit Judges.

PER CURIAM

After examining the briefs and the appellate records, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of these appeals. **See** Fed. R. App. P. 34(a); Tenth Circuit R. 10(e). These causes are therefore ordered submitted without oral argument.

Appellants Thomas and Aneta Erickson were indicted for various violations of federal income tax laws. They were arraigned, with retained counsel present, on December 6, 1979. A hearing on any motions was scheduled for December 24 and trial was set for January 7, 1980. Appellants had ten days after arraignment within which to file motions. **See** W.D. Okla. R. 13(e).

On December 9 the Ericksons retained a new attorney. On December 11 appellant's original counsel requested to withdraw. The district court immediately entered an order allowing such withdrawl, but stated no extension of time to file motions would be given.

On December 17 the Ericksons' new counsel filed a motion for continuance. The district court rescheduled the trial for February, 1980, but stated the continuance did not include any extension of time for the filing of motions.

On January 2, 1980, the Ericksons' new counsel filed a "Motion for Leave to File Document Out of Time," in which he sought leave to file an untimely motion to suppress. The district court denied the motion, stating that

appellants and their original counsel had been made aware of local Rule 13(e) at the arraignment; that in granting the trial continuance, no extension of time was given for filing of motions; and that appellants had filed no motion within the ten-day period after arraignment requesting an extension of time to file motions.

Appellants subsequently filed another "Motion for Leave to File Documents Out of Time," this time seeking permission to file an untimely "Motion to Permit Inspection of Grand Jury Minutes and Attendance Records." The district court also denied this motion.

The Ericksons filed notices of appeal from the district court's order denying each motion for leave to file the documents out of time. We have determined that the denial of the motions to file documents out of time are not final, immediately appealable orders.

The law is clear that an order denying a motion to suppress is not appealable. **DiBella v. United States,** 369 U.S. 121 (1962). In determining whether an order is final and appealable, we cannot find a meaningful distinction between a denial motion to suppress. Therefore, we conclude the district court's order denying appellants leave to file an untimely motion to suppress is not appealable. **Cf. United States v. Watson,** 594 F. 2d 1330 (10th Cir.), **cert. denied,** 100 S. Ct. 78 (1979) (denial of motion to suppress on the grounds it was untimely filed did not constitute abuse of discretion).

We similarly conclude the district court's order denying appellants leave to file an untimely motion to inspect the

grand jury minutes and attendance records is not within the small class of cases that are beyond the confines of the final judgment rule. **See generally** 28 U.S.C. §1291; **United States v. MacDonald,** 435 U.S. 850 (1978); **United States v. Ritter,** 587 F. 2d 41 (10th Cir. 1978).

Appellants' memorandum filed with this court asks us in the alternative to treat this appeal as a petition for a writ of mandamus. We decline to do so because the procedural requirements for mandamus have not been met.

APPEALS DISMISSED.

APPENDIX "J"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,

vs.

No. 80-1076
80-1077
80-1085
80-1086

THOMAS C. ERICKSON and ANETA J. ERICKSON,
Defendants-Appellants.

PETITION FOR HEARING AND SUGGESTION FOR REHEARING IN BANC

On Appeal from the Judgment of the United States District Court for the Western District of Oklahoma

CLYDE R. MAXWELL
MORGAN C. TAYLOR
Attorneys at Law
567 San Nicolas Dr., Suite 401
Newport Beach, California 92660
(714) 644-5232

Attorneys for Defendants-Appellants

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v. **No. 80-1076**
THOMAS C. ERICKSON,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Defendant-Appellee,
v. **No. 80-1077**
ANETA J. ERICKSON,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
V. **No. 80-1085**
THOMAS C. ERICKSON,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
V. **No. 80-1086**
ANETA J. ERICKSON,
Defendant-Appellant.

PETITION FOR REHEARING
AND
SUGGESTION FOR REHEARING IN BANC

The appellants petition for rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure, for the reasons that certain points of law and fact have been overlooked or misapprehended by the Court, in its Opinion, filed April 1, 1980 as follows:

I

The Court apparently has decided that the two motions under consideration — the first being a Motion to File Documents Out of Time to which a Motion to Suppress was attached, and the second being a Motion to File Documents Out of Time to which a Motion to Inspect Certain Grand Jury Records was attached — should be treated differently. On page three of the Opinion, the Court disposed of these motions on different grounds. The first motion was found to be non-appealable because the motion that it referred to was a motion to suppress — and since denial of a motion to suppress would not be immediately appealable, the motion to file it out of time would not be either. The second motion was found to be non-appealable because it was "not within the small class of cases that are beyond the confines of the final judgment rule." (page 3, third paragraph).

The appellants concede, first of all, that denial of a motion to suppress is not immediately appealable. **Di-**

Bella v. United States, 369 U.S. 121 (1962). Nor, arguably, would the motion to inspect grand jury records be appealable before trial. However, these points are really irrelevant here. The motions to file out of time are **distinctly different** from the motions to which each applied. For purposes of argument, we will refer to the motions to file out of time as the "procedural motions", and the motions to suppress and to inspect grand jury records as the "substantive motions".

The procedural motions only relate to the appellant's **rights to be heard** — they do not in any way relate to the matters which are to be heard. In contrast, the substantive motions relate only to matters which are to be heard, and **not** to the rights of the appellants to present their views. Because the procedural and substantive motions are so fundamentally different, it is misleading to apply the same rules of appealability to the procedural motions that would be applied to the underlying substantive motion. The substantive motions have **not** been denied, because they have not been filed.

Therefore, it is respectfully submitted that the basis for decision as to both of the procedural motions that are tentatively before the Court for review, should be the same, whether the Court finds the Orders herein appealable or not.

II

We therefore proceed with an analysis of the appealability of the Orders denying the **procedural** motions. When these issues are **separated** from those pertaining only to the substantive motions, the situation should be clear.

The most important authorities dealing with"collateral orders", and which the Court did not cite in its decision, are **Abney v. United States,** 431 U.S. 651, 52 L. Ed. 2d 651 (1977), and **Helstoski v. Meanor,** _____U.S._____, 61 L. Ed. 2d 30 (1979).

Appellants concede that the issues of whether evidence should be suppressed, or whether they should be granted the right to inspect certain grand jury records, are **not** really collateral to the main action. But whether they have a **procedural right** to file their motions and to have a **hearing** thereon most surely **is** collateral. Abney, supra, requires that the matter not be left "open, unfinished, or inconclusive" — which is the case here, where the District Court has actually cut off the procedural right to file motions.

Second, **Abney** requires that the Order appealed from not be simply a "step toward final disposition of the case which would be merged in final judgment," but one which "resolved an issue completely collateral to the cause of action asserted." Here, the issue of whether the appellants have the **right** to file their motions has no bearing on the **merits** of the motions or on the **guilt or innocence** of the appellants. The issue of appellant's procedural rights has already been terminated with as much finality as is ever possible.

And third, as in **Abney,** there is no doubt that the rights sought to be redeemed would be lost, "probably irreparably," if review had to wait until final judgment in the criminal case as a whole. That, in fact, is the **purpose** of

rules which, in effect, penalize parties for ostensible failure to follow them.

In addition to **Abney,** the Supreme Court has indicated in **Helstoski, supra,** that the collateral orders doctrine is to be applied broadly. There, the Court held that where a (congressman's) Speech or Debate privilege had been denied there was nothing further that could be accomplished on that ground in the trial court, and the Order was therfore immediately appealable — even though the case was a criminal one such as we have here. Furthermore, the Court indicated that the application of **Abney** (which involved a double jeopardy claim) should have been predictable to **Helstoski,** and should have proceeded by appeal rather than by mandamus.

It is therefore respectfully requested that the Court of Appeals assume jurisdiction over this appeal, and that it grant the relief prayed for therein. Inasmuch as the issue of the applicability of the "collateral orders" doctrine in this situation is one of first impression, appellants respectfully suggest that the case is a proper one for rehearing before the Court in banc.

A separate Petition for Mandamus has been made to this Court, and for that reason, the Court's decision not to treat the Appeal as such Petition will not be discussed here.

Respectfully submitted,

CLYDE R. MAXWELL
MORGAN C. TAYLOR
Attorneys at Law
567 San Nicolas Drive, Suite 401
Newport Beach, California 92660
(714) 644-5232

DATED: By _____,
CLYDE R. MAXWELL

PROOF OF SERVICE

STATE OF CALIFORNIA)
ss
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 612 North Bush Street, Santa Ana, California 92701.

On April , 1980, I served the within PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC on the interested parties in said action, by placing a true copy in a sealed envelope, with postage thereon fully prepaid in the United States mail at Santa Ana, California, addressed as follows:

Larry D. Patton, United States Attorney
William S. Price, Assistant United States Attorney
4434 Federal Building
200 N.W. Fourth
Oklahoma City, Oklahoma 73102

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on April 1980, at Santa Ana, California.

JACK GALLAGHER

APPENDIX "J"

CLYDE R. MAXWELL, ESQUIRE
MORGAN C. TAYLOR, ESQUIRE
567 San Nicolas Drive, #401
Newport Beach, Calif. 92660
Telephone: (714) 644-5232

Attorney for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THOMAS C. ERICKSON and ANETA J. ERICKSON, **Petitioners,** **vs.** **LUTHER B. EUBANKS, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA,** **Respondent.**	**Case No. 80-1394** **PETITION FOR MANDAMUS TO COMPEL FILING OF PRETRIAL MOTIONS**
UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **THOMAS C. ERICKSON and ANETA J. ERICKSON,** **Defendants.**	(D.C. No. CR-79-184-E)

Petition for Writ of Mandamus to the Honorable Luther B. Eubanks, United States District Judge for the Western District of Oklahoma:

Pursuant to Rule 21 of the Federal Rules of Appellate Procedure, the Petition of Thomas C. Erickson and Aneta J. Erickson, hereinafter referred to as petitioners, respectfully shows that:

1. The facts necessary to an understanding of the issues presented by this application are as follows:

a. Defendants were arraigned on December 6. 1979. Clyde R. Maxwell was retained by defendants on December 10, 1979, while conducting a criminal trial in Houston, Texas which concluded on December 20, 1979. Because of counsel's difficult schedule both during and after the Houston trial, and pursu-ant defendant's waiver of speedy trial, a continuance was granted on December 18, 1979, continuing trial of the instant case from January 7, to February 11, 1980. No corresponding continuance for filing of motions was granted, and the Court stated at that time that counsel for defendants had until ten days after arraignment to file pretrial motions, however, that time limit had already expired on December 16, 1979. On December 28, 1979, counsel filed with the court a Motion for Leave to File Documents Out of Time, to which was attached a Motion to Suppress Evidence, and an affidavit providing a factual basis of good cause for late filing of the motion. The Motion for Leave to File Documents Out of Time was denied by the Court on January 2, 1980, and the Motion to Suppress Evidence was considered as though never filed. Thereupon a Notice of Appeal was filed by defendants on January 11, 1980.

On January 2, 1980, counsel filed with the Court a

Motion for Leave to File Documents Out of Time, to which was attached a Motion to Permit Inspection of Grand Jury Minutes and Attendance Records, and an affidavit providing a factual basis of good cause for late filing of the motion. The Motion for Leave to File Documents Out of Time was denied by the court on January 7, 1980, and the Motion to Permit Inspection of Grand Jury Minutes and Attendance Records was considered as though not filed. There-upon another Notice of Appeal was filed by defendants on January 15, 1980.

The United States Court of Appeals for the Tenth Circuit, on April 1, 1980, has since disposed of the appeals by dismissing them for the reason that the Orders appealed from are non-appeallable since they are not, in the Court's opinion, final orders to which **28 U.S.C.** §1291 would apply. At this time, a Petition for Rehearing and Suggestion for Rehearing In Banc are pending in the Tenth Circuit.

b. Copies of the motions that were filed with the District Court are attached, as is a copy of the arraignment proceedings before Judge Eubanks, at which time previous counsel for the defendants were informed that more time in which to file motions could be obtained if needed. The relevant part of the record is as follows:

> "THE COURT: And that plea will be noted by the Clerk. Your lawyers will be given ten days from today to file any motions that are needed or any that may be deemed proper, that is pursuant to our local rule that lawyers are well acquainted with, 13-E.

> "MR. BLOODWORTH: If the Court please, we are well acquainted with 13-E but there are 45 counts in this Indictment and could we at this time orally ask for additional time or do you want that in writing?
>
> "THE COURT: Well, why don't you look at and see if you can do it and the Court would be lenient there but not beyond, now, let me explain, I have the docket during this month and it's not only in keeping with our [sic] local rule but our good relationship as between judges, I must clean these motions all up and get the case ready for trial for Judge Daugherty's docket in January and he's already set his docket to start January 7th. So, I'm not at liberty to extend your motion filing a great deal because the Government is to be given a little time. But certainly when you look into it if you absolutely need more time let me know.
>
> "MR. BLOODWORTH: Thank you, Your Honor.
>
> "THE COURT: But within that — those perimeters, you see, I got to get responses. And I'm going to apply the rule at this moment and I have authority, you know, to extend the time, either shorten or lengthen and in this case lengthen, but I'm going to set them for oral argument for Thursday, December 27th. If, however, it becomes imperative that you need some time then we will hear them Thursday after New Years, whatever date that be, would that be about the 5th, I guess, 3rd or

4th. But the Defendants will remain free under the bond that you posted with the Magistrate, yesterday to await trial."

The Court began by giving 10 days in which to file motions, but then explained that he would be lenient in case extra time was needed. The only constraint facing the Judge at that time was that the case had to be ready before trial on January 7, 1980, and the motions had to be heard and ruled on by that time. The Judge explained: "So I'm not at liberty to extend your motion filing a great deal because the Government is to be given a little time. But certainly when you look into it if you absolutely need more time let me know." (Reporter's transcript, page 5, lines 11-14) when Mr. Maxwell received a continuance on December 18, 1979, continuing the trial until February 11, 1980, all of the obstacles to continuing the motions as well were removed, at least according to the criteria recited by Judge Eubanks. In fact, the very reasons that Judge Eubanks relied upon in granting the continuance of trial were the same reasons Mr. Maxwell gave when he sought, just a few days later, for leave to file motions out of time. Under the circumstances, counsel for defendants asserts that the Judge has clearly committed an abuse of discretion.

2. The issues presented and the relief sought are as follows:

a. The issues in this case are, first, whether the District Court abused its discretion or acted inconsistently and unfairly, under the circumstances, by denying defendants'

motions for leave to file documents out of time, and refusing to allow defendants to file the respective motions to which they were annexed.

Second, it is in issue whether the action of the District Court denied the defendants due process of law, where there has been no intentional waiver by the defendants of the rights which they seek to vindicate by their pretrial motions, especially in light of the District Judge's duty to supervise the fair administration of justice in the federal courts.

Third, it is an issue whether the action of the District Court denied the defendants effective assistance of counsel, where counsel was retained several days after arraignment and could not become familiar with the case immediately because of a prior trial commitment which, in fact, caused the Court to grant a continuance of the instant case, and where counsel filed motions as soon thereafter as was possible, well in advance of trial, and presented affidavits of good cause for late filing to the Court, and where the Court nevertheless refused to allow filing of said motions.

b;. The relief sought here is a writ of mandamus to compel the District Court to permit the defendant's pretrial motions to be filed and considered.

3. The writ should issue for the following reasons:

a. Petitioners have a clear right to the relief sought. The Court of Appeals may issue the writ in aid of its own jurisdiction. Here, where the writ will be issued to a lower Court within the jurisdiction of the Tenth Circuit, and will preserve the issues sought to be raised by the

suppression motion for appellate consideration, the right of the petitioners to this form of relief is clear.

b. There is clear and peremptory duty on the part of the District Court to do the act in question.. Rule 12(b) of the Federal Rules of Criminal Procedure provides that:

> "Any defense, objection, or request which is capable of determination without trial of the general issue may be raised before trial by motion. . . . The following must be raised prior to trial: (1) Defenses and objections based on defects in the institution prosecution; or (2) Defenses and objections based on defects in the indictment or information . . .; or (3) Motions to suppress evidence; or Requests for discovery under Rule 16 . . ."
>
> Subsection (c) provides that:
>
> "Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing."

Rule 41, subsection (e) and (f) provide, respectively, that a motion for return of property made after an indictment shall be treated as a motion to suppress under Rule 12, and that motions to suppress may be made in the Court of the district of trial, as provided in Rule 12.

Taken together, these rules essentially for the orderly disposition of certain kinds of claims that are typically, if not routinely, raised in criminal prosecutions. According

to rules that have evolved in Congress and the Courts, a party with a valid claim of one kind or another would presumably be entitled to appropriate relief, which could be obtained by making a timely motion. In other words, relief is to be had as a matter of right, providing it is timely requested.

For a request or motion to be timely, it must be raised **prior to trial.** That is the principal requirement of Rule 12 (b), and the Courts have agreed that in the usual case, the rule is a fair one. See e.g., **Jones v. United States,** 362 U.S. 257, 264, 4 L. Ed. 2d 697 (1960). Rule 12 (c) only provides for the orderly application of 12 (b). The Notes of the Advisory Committee on Rules provide us with the rationale of 12 (c) regarding motion dates:

> ". . . This and other amendments to rule 12 are designed to make possible and to encourage the making of motions prior to trial, whenever possible, and in a single hearing rather than in a series of hearings. This is the recommendation of the American Bar Association's Committee on Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) . . ."

Similarly, the Notes of the Advisory Committee on Rules re-affirm this basic purpose in the note to Rule 41(e):

> "A sentence is added to subdivision (e) to provide that a motion for return of property, made in the district of trial, shall be treated also as a motion to suppress under rule 12. This change is intended to

further the objective of rule 12 which is to have all pretrial motions disposed of in a single court appearance rather than to have a series of pretrial motions made on different dates, causing undue delay in administration." (emphasis added)

In **Jones v. United States, supra,** at 264, Justice Frankfurter, speaking for an eight member majority, note that:

". . . This provision of Rule 41(e), requiring the motion to suppress to be made before trial, is a crystalization of decisions of this Court requiring this procedure, and is designed to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt. (citations omitted). As codified, the rule is not a rigid one, for under Rule 41 (e), 'the court in its discretion may entertain the motion [to suppress] at the trial or hearing.' **This qualification proves that we are dealing with carrying out an important social policy and not a narrow, finicky procedural requirement."** (emphasis added).

In **Jones** the Court was dealing with the old form of Rule 41(e), the function of which is now included in Rule 12. However, the rationale of the Court is now lost. We are still dealing with an important social policy, one that is in fact tied closely with notions of due process and a fair trial.

In this case, the facts indicate an attempt by counsel to file motions **well in advance** of trial. In fact, the trial itself

was **continued** for the very reasons given by counsel for his inability to meet the Court's motion deadlines. Why the motion date was not also continued upon timely request is a mystery. Given the trial continuance, there remained a great deal of time in which motions could have been prepared, heard, and condsidered all at once. There would have been no burdensome administrative problems thrust on the trial judge in these circumstances. As set forth in the accompanying affidavits of petitioners' counsel, the motions that were tendered for filing were prepared as quickly as possible under the circumstances, well in keeping with the policy of Rule 12 to make such motions **before** trial. The cause of delay, as set out in the affidavits, was counsel's late entry in the case (several days after arraignment), current involvement in another trial, and other attendant problems.

The petitioners do **not** waive the rights intended to be vindicate their motions. They did **not** wait until trial to raise the issues contained therein, or cause any undue surprise or disruption of the trial. Certainly, the "punishment" (foreclosing petitioners' rights) does not fit the "crime" (tendereing motions for filing as soon as possible, well in advance of trial, in keeping with Rule 12 (b)).

Petitioners' rights to have their motions filed and considered on the record are clear. The failure of the trial judge in this instance amounts to an abuse of discretion and denial of effective assistance of counsel, which can be remedied by a writ of mandamus compelling him to consider the motions as filed. No request is made to the

Court of Appeals to direct the District Court to grant the tendered motions, only to consider them on the record and to see that appellants receive a fair trial. The District Court **has a duty** to oversee the federal judicial process and to ensure a fair trial in every instance.

c.**No other adequate remedy is available.** If the petitioners' motions are not raised **before** trial, then they may only be considered thereafter in the **discretion** of the reviewing court, or in the discretion of the trial court **during** trial. The petitioners intend to make the motions that they are entitled to make **as of right,** and to this end they have submitted their motions well before trial. If the writ is not granted and the case proceeds to trial, the petitioners' rights have been all but lost. The scope of review by the Court of Appeals will be minimal. In addition, if the District Court grants petitioners' motions, there would be no need for trial at all.

Apparently, despite petitioners' good faith beliefs in this regard, the Tenth Circuit Court of Appeals has decided that appeal is not available in this instance to remedy the wrong that petitioners have suffered, and for this reason, mandamus must be the proper avenue for them to pursue.

4. Copies of the relevant motions and the Reporter's Transcript of the arraignment are attached hereto as Exhibits "A", "B" and "C", in support of this petition.

WHEREFORE, petitioners respectfully request that the Court will grant their Petition for Mandamus and compel the District Court to permit their pretrial motions to be properly filed and considered on the record.

Dated this 9th day of April, 1980.

CLYDE R. MAXWELL
MORGAN C. TAYLOR
Attorneys for Petitioners

By CLYDE R. MAXWELL

APPENDIX "K"

MARCH TERM - APRIL 25, 1980
Before The Honorable William J. Holloway, Jr., The Honorable Jean S. Breitenstein and The Honorable Stephanie K. Seymour, Circuit Judges

THOMAS C. ERICKSON and ANETA J. ERICKSON,

Petitioners,

vs.

LUTHER B. EUBANKS, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA,

Respondent.

No. 80-1394 (SEAL)

This matter comes on for consideration of the petition for writ of mandamus filed in the captioned case.

Upon consideration whereof, it is ordered the petition for writ of mandamus is denied.

HOWARD K. PHILLIPS, Clerk
By: Robert L. Hoecker
Chief Deputy Clerk

APPENDIX "L"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS C. ERICKSON and ANETA J. ERICKSON,

Defendants.

CASE NO. CR-79-184-E

* * * * *

ARRAIGNMENT
HAD BEFORE THE HONORABLE LUTHER B. EUBANKS
IN OKLAHOMA CITY, OKLAHOMA
ON DECEMBER 6, 1979

* * * * *

APPEARANCES:

MR. WILLIAM S. PRICE, Assistant United States District Attorney, Federal Building, Oklahoma City, Oklahoma, appearing on behalf of the Government.

MESSRS. GARLAND BLOODWORTH and ROBERT B. SMITH, Attorneys at Law, of the Firm of BLOODWORTH, SMITH, BISCONE, Hightower Building, Oklahoma City, Oklahoma, appearing on behalf of the Defendants.

REPORTED BY:
STEVE MEADOR, C.S.R.

THE COURT: United States versus Thomas C. and Aneta J. Erickson.

MR. BLOODWORTH: If the Court please, the Defendants are present.

THE COURT: Very well. Come forward, please. Now, Mr. Smith, do you represent one of the Defendants?

MR. BLOODWORTH: No, if the Court please we are ...

THE COURT: Well, you gentlemen are associated in practice together.

MR. BLOODWORTH: Yes.

THE COURT: The Defendants I take it, you are Thomas C. Erickson.

THE DEFENDANT: Yes, sir.

THE COURT: And the lady Aneta J. Erickson.

MR. BLOODWORTH: That is correct, Your Honor.

THE COURT: Now, let me inquire here, you folks have likely received a copy of this Indictment, actually there's two Indictments returned but it was found that through an advertence the first one returned did not show the statute, the citation of the statute under which the Indictment was returned so it has been dismissed and a new Indictment returned which I understand to be identical. I haven't read them but other than it does add the section of the statute. Have you gentlemen checked that? Now, you have received a copy of it?

MR. BLOODWORTH: Yes, sir, and we waive it, Your Honor.

THE COURT: Good. Thank you very much. I appreciate it. Is that all right with you folks that we just not read it,

you have read them and you know what you are charged with —

DEFENDANT MR. ERICKSON: Yes, sir.

THE COURT: — is that right? Good. Appreciate it. Saves time and accomplishes no good that I know of where the plea is one of not guilty which is I am sure the plea which will be entered here.

MR. BLOODWORTH: That is our plea, Your Honor.

THE COURT: However, I think the rule does require that we state for the record the upper limits of the punishment for those that are convicted of the violations of the particular statute. Would you do that, Mr. Price?

MR. PRICE: Your Honor, as to Counts 1 through 6 in which Count 1 charges Thomas C. Erickson and Count 2 Aneta Erickson and Count 3 Thomas Erickson and Count 4 Aneta Erickson, Count 5 Thomas Erickson, Count 6 Aneta Erickson, on each of those counts the maximum punishment provided by law is imprisonment not more than one year and a fine of not more than $10,000.00 in addition to the civil tax and penalties due or both such fine and imprisonment.

As to Counts 7 through 37 that charge — each charge Thomas Henderson — I mean Thomas Erickson and in addition Counts 38 through 43 charge Aneta Erickson, the penalty on all of those counts are the same which is, maximum penalty provided by law of a fine of not more than three years — excuse me, a fine of not more than $5,000.00 and imprisonment not more than three years or both such fine and imprisonment as to each of those counts.

As to the final two counts, Counts 44 and 45, maximum penalty provided by law is a fine of not more than $1,000.00 and imprisonment not more than one year or both such fine and imprisonment.

THE COURT: Well, I'm not going to take time to add that up, if sombody's curious, they may do so but quickly with respect to Mr. Erickson, if he should be convicted on all counts, you could get over 100 years here if they're added, you know, one to start, the other end. And I don't know about her, maybe some fourth or third of that, but, anyhow, that's something that your lawyers can advise with you on. The Defendants each wish to enter a plea of not guilty with respect to each count wherein you are charged, is that right?

MR. BLOODWORTH: That is correct, Your Honor/

THE COURT: And that plea will be noted by the Clerk. Your lawyers will be given ten days from today to file any motions that are needed or any that may be deemed proper, that is pursuant to our local rule that lawyers are well acquainted with, 13-E.

MR. BLOODWORTH: If the Court please, we are well acquainted with 13-E but there are 45 counts in this Indictment and could we at this time orally ask for additional time or do you want that in writing?

THE COURT: Well, why don't you look at and see if you can do it and the Court would be lenient there but not beyond, now, let me explain, I have the docket during this month and it's not only in keeping with our local rule but our relationship as between judges, I must clean these

motions all up and get the case ready for trial for Judge Daugherty's docket in January and he's already set his docket to start January 7th. So I'm not a liberty to extend your motion filing a great deal because the Government is to be given a little time. But certainly when you look into it if you absolutely need more time let me know.

MR. BLOODWORTH: Thank you, Your Honor.

THE COURT: But within that — those perimeters, you see, I got to get responses. And I'm going to apply the rule at this moment and I have authority, you know, to extend the time, either shorten or lengthen and in this case lengthen, but I'm going to set them for oral argument for Thursday December 27th. If, however, it becomes imperative that you need some time then we will hear them Thursday after New Years, whatever date that be, would that be about the 5th, I guess, 3rd or 4th. But the Defendants will remain free under the bond that you posted with the Magistrate, yesterday t await trial.

MR. BLOODWORTH: Thank you, Your Honor.

THE COURT: All right.

CERTIFICATE

STATE OF OKLAHOMA)
ss
COUNTY OF OKLAHOMA)

I, Steve Meador, Certified Shorthand Reporter within and for the State of Oklahoma, do hereby certify that the above and foregoing Arraignment was by taken in short-hand and thereafter transcribed, and that the same was taken on the 6th day of December, 1979, in the City of Oklahoma City, County of Oklahoma, State of Oklahoma, and that I am not an attorney for or relative of either of said parties, or otherwise interested in the even of said action.

In Witness Whereof, I have hereunto set my hand on this 29th day of January, 1930.

Steve Meador, C.S.R
within and for the State of Oklahoma

PROOF OF SERVICE

STATE OF CALIFORNIA)
ss.
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 612 N. Bush Street, Santa Ana, California 92701.

On May 5, 1980, I served the within Petition for Writ of Certiorari on the interested parties in said action, by placing a true copy in each of 3 sealed envelopes, with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

WADE McCREE
Solicitor General of
The United States
Department of Justice
Washington, D.C.

JAMES D. PATTON
United States Attorney
William S. Price
Assistant U.S. Attorney
4434 Federal Building
Oklahoma City, Oklahoma 73102

HONORABLE LUTHER B. EUBANKS
U.S. District Judge
Western District of Oklahoma
U.S. Court House
Oklahoma City, Oklahoma 73102

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on May 5, 1980, at Santa Ana, California.

Jack Gallagher